CRIMINAL FORFEITURE PROCEDURE FROM A TO Z

Separating the Defendant From His Property
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I. INTRODUCTION

This outline summarizes the key points in criminal forfeiture procedure.

- It begins with the law on the drafting of the forfeiture allegation in an indictment and continues more or less chronologically through the trial, sentencing, ancillary proceeding and post-trial phases of a criminal forfeiture case.

- Rule 32.2, Federal Rules of Criminal Procedure, governs all criminal forfeiture proceedings

- Most of the cases cited in this outline are from the past 2 or 3 years; the case law is presented in much greater detail in the Civil and Criminal Forfeiture Procedure handbook.

Overview - Forfeiture is part of the defendant's sentence

The Supreme Court has held that criminal forfeiture is part of the defendant's sentence.

- *Libretti v. United States,* 516 U.S. 29 (1995); *see* Rule 32.2(b)(3) (the order of forfeiture "shall be made part of the sentence and included in the judgment");

A number of things flow from that:

1. Because forfeiture is part of the sentence, there is no forfeiture unless the defendant is convicted

   - *United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996) (because § 1957 conviction was reversed on appeal, § 982 forfeiture order had to be vacated); *United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997) (same for § 1956).

2. Because forfeiture is part of the sentence, the forfeiture is limited to the property connected to the offenses for which the defendant was convicted

   - *United States v. Garcia-Guizar*, 160 F.3d 511 (9th Cir. 1998) (where defendant is charged with selling $5,000 worth of drugs but $43,000 is seized from his locker, only the amount traceable to the offenses for which defendant is convicted can be forfeited in the criminal case; same for conspiracy count if it is limited to commission of the substantive offense);

3. Because forfeiture is part of the sentence, the forfeiture issues are handled separately in a bifurcated trial

   - *See* Rule 32.2(b)(1) (forfeiture proceeding takes place "as soon as practicable" after court enters guilty verdict);

– in fact, the defendant can plead guilty to the offense and still contest the forfeiture

   - *United States v. Cunningham*, 201 F.3d 20 (1st Cir. 2000) (because forfeiture is part of the sentence and not part of the criminal offense, a defendant may plead guilty to the offense and reserve the right to contest the forfeiture);

4. Because forfeiture is part of the sentence, the burden of proof in the forfeiture proceeding is preponderance of the evidence

   - *United States v. Bellomo*, 176 F.3d 580, 595 (2d Cir. 1999) (because forfeiture is part of sentencing, the preponderance standard applies to criminal forfeiture);

5. Because forfeiture is part of the sentence, only property that belongs to the defendant can be forfeited

   - *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185, 1190 (D.C. Cir. 1995) ("only the property of the defendant (including property held by a third party pursuant to a voidable transaction) can be confiscated in a RICO proceeding");

   - *United States v. O'Dell*, 247 F.3d 655 (6th Cir. 2001) (criminal forfeiture "entitles the Government to forfeiture of a convicted defendant's interests and nothing more"; defendant's only interest was right to become owner in the future if he maintained loan payments);

- *United States v. Gilbert*, 244 F.3d 888, 919 (11th Cir. 2001) ("because it seeks to penalize the defendant for his illegal activities, *in personam* forfeiture reaches only that property, or portion thereof, owned by the defendant"); *id.* at 920 (what distinguishes criminal forfeiture from civil forfeiture is that "the property itself is not forfeited; rather, the defendant's *interest* in the property is forfeited") (emphasis in original);

– third parties cannot intervene in the trial to contest the forfeiture, but at the end of the trial, there is an **ancillary proceeding** in which a third party can say, "wait a minute, the property being forfeited belongs to me, not to the defendant"

- *United States v. Pelullo*, 178 F.3d 196 (3d Cir. 1999) (criminal forfeiture occurs in two steps: (1) the jury determines the forfeitability of the property and the district court enters an order of forfeiture; and (2) third parties assert their interests in an ancillary proceeding);

- Rule 32.2(b) makes clear that determining the extent of the defendant's ownership interest *vis à vis* third parties is deferred to the ancillary proceeding

- *see* 21 U.S.C. § 853(n) (setting forth the procedures for litigating third party claims in the ancillary proceeding);

The prosecutor has to keep these basic principles in mind when contemplating the forfeiture of property in a criminal case.

– in particular, if our objective is to forfeit a particular bank account, a parcel of land or a corporate jet, we must ask:

1) is there a nexus between the property I want to forfeit and the crime I plan to charge?

– is this bank account the proceeds of the mail fraud offense? Was it involved in the money laundering offense? Could I select different offenses that would allow me to forfeit more property?

2) who is the true owner of this property?

- does this land belong to the defendant or to his wife? Is the jet the defendant's property or does it belong to his corporation?

- should I include the wife and corporation as defendants in order to make sure I can forfeit this property in the criminal case?

- *United States v. Jimerson*, 5 F.3d 1453 (11th Cir. 1993) (the Government may not use the ancillary proceeding to forfeit the interests of third parties);

- *United States v. Kennedy*, 201 F.3d 1324 (11th Cir. 2000) (where husband and wife are tenants by the entireties, only husband's interest is forfeitable in a criminal case);

- *United States v. Najjar*, ___ F.3d ___, 2002 WL 1792090 (4th Cir. Aug. 6, 2002) (Government superseded indictment to name corporation as defendant when it realized that otherwise property belonging to corporation could not be forfeited);

This does not mean that the property you want to forfeit has to be in the defendant's name.

— property held by nominees and alter egos can be forfeited, if the defendant is the true owner

--- the third party will have a chance to contest that in the ancillary proceeding

- *See* 21 U.S.C. § 853(n)(6)(A)

- *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996) (house forfeited from defendant based on evidence establishing that defendant's uncle, whose name appeared on the deed, was a mere straw);

- *United States v. Ida*, 14 F. Supp.2d 454 (S.D.N.Y. 1998) (criminal forfeiture of real property held in third party's name was proper where third party was a straw);

- *United States v. Simmons*, 154 F.3d 765 (8th Cir. 1998) (corporate form may be ignored where defendants received bribe money through non-defendant corporation);

Likewise, the proceeds of the crime, and property that belonged to the defendant at the time he committed the crime, can be forfeited, even though the defendant has tried to pass that property on to third parties

- *See* 21 U.S.C. §§ 853(c) & (n)(6)(B) (proceeds and property used to commit the crime become subject to forfeiture at the time the crime is committed, unless sold to a bona fide purchaser)

- *United States v. Cuartes,* 155 F. Supp. 2d 1338 (S.D. Fla. 2001) (upon conviction of money launderer under section 1956(h), Government may seek criminal forfeiture of money defendant has sold, through the black market, to a third party; third party must assert bona fide purchaser defense in the ancillary proceeding);

— this is usually how we forfeit attorneys fees in a criminal case:

- *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660 (4th Cir. 1996) (property transferred to lawyer as attorney's fee);

- *United States v. Saccoccia*, 165 F. Supp. 2d 103 (D.R.I. 2001) (explaining how the relation back doctrine works);

We will discuss all of that in detail when we talk about the ancillary proceeding

— for now, the point is that you must be aware that criminal forfeiture is limited to the defendant's property when you decide who the defendants will be, and what property you want to forfeit, in the criminal case.

II. INDICTMENT

A. Naming property in the forfeiture allegation

Rule 32.2(a) provides that no forfeiture can be imposed unless the indictment contained a forfeiture allegation.

> (a) NOTICE TO THE DEFENDANT. A court shall not enter a judgment of forfeiture in a criminal

proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.

The Commentary explains this as follows:

Subdivision (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself. The subdivision reflects the trend in case law interpreting present Rule 7(c). Under the most recent cases, Rule 7(c) sets forth a requirement that the government give the defendant notice that it will be seeking forfeiture in accordance with the applicable statute. It does not require a substantive allegation in which the property subject to forfeiture, or the defendant's interest in the property, must be described in detail.

- this is a notice provision: the property subject to forfeiture need not be itemized.

  - *United States v. Lino*, 2001 WL 8356 (S.D.N.Y. 2001) (under Rule 32.2(a), Government need not detail property subject to forfeiture in the indictment; to the extent that a bill of particulars is required, Government's agreement to provide particulars 60-days before trial is sufficient);

  - *United States v. Iacaboni*, ___ F. Supp.2d ___, 2002 WL 1880390 (D. Mass. Aug 13, 2002) (Rule 32.2(a) makes clear that itemized list of property need not appear in the indictment; tracking language of § 982(a)(1) was sufficient);

  - *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997) (Government need only put defendant on notice that it would seek to forfeit everything subject to forfeiture under the applicable statute,

such as all property "acquired or maintained" as a result of a RICO violation);

- *United States v. Diaz*, 190 F.3d 1247 (11th Cir. 1999) (gov't complies with Rule 7(c)(2) and due process if the indictment tracks language of the forfeiture statute, and gov't informs defendant of its intent to forfeit specific asset after the guilty verdict and before the forfeiture phase of the trial begins);

The extent of the defendant's interest need not be specified:

- *United States v. Loe*, 248 F.3d 449 (5th Cir. 2001) (indictment that named the real property that was subject to forfeiture was sufficient; not necessary for Government to allege that defendant held only 52.6 percent interest in the property, as was later established at trial);

- *United States v. Frye*, 202 F.2d 270, 2000 WL 32029 (6th Cir. 2000) (Table) (requirement that indictment allege extent of defendant's interest is satisfied if indictment says that the Government will forfeit all of his interest);

- *United States v. Bainbridge Management, Inc.*, 2002 WL 538777 (N.D. Ill. 2002) (Government was not required to present grand jury with evidence of defendant's ownership of the property; indictment only gives defendant notice that whatever interest he may have will be forfeited);

— a sample forfeiture allegation is attached to this outline, and there are samples pertaining to all the common criminal offenses on the AFOnline website.

- Form CRM2001 *et seq.*

While itemizing the property is not required, it is frequently done. Why?

— if you plan to obtain a pre-trial restraining order (*see* 21 U.S.C. § 853(e), *infra*), you need to show that the property you want to restrain is subject to forfeiture in the event of a conviction

— the same is true for filing a *lis pendens* on real property

— you could use the boilerplate language in the indictment, and then name the property later in a bill of particulars

- *United States v. Davis*, 177 F. Supp.2d 470 (E.D. Va. 2001) (approving Government's naming automobile as subject to forfeiture in a bill of particulars, where indictment used general language tracking the forfeiture statute);

— but if you're seeking a restraining order, it may be helpful to be able to tell the court that the grand jury heard evidence regarding the particular property and found probable cause for forfeiture.

So while, in general, you can satisfy the notice requirement simply by tracking the language of the forfeiture statute, if you plan to get a restraining order, you will want to present evidence supporting the forfeiture of specific property to the grand jury, and name that property in the indictment

B. Applying criminal forfeiture retroactively

Because criminal forfeiture is part of the defendant's sentence, it is regarded as punitive for purposes of the *ex post facto* clause.

– this is relevant to offenses that occurred before the effective date of the applicable forfeiture statute

- *United States v. Colon-Munoz*, 192 F.3d 210 (1st Cir. 1999) (application of § 982(a)(2) to conspiracy that began before effective date violates *ex post facto* clause where no overt act occurred after that date);

So although Congress enacted legislation permitting the criminal forfeiture of all criminal proceeds in 2000, it is still necessary to charge money laundering to forfeit proceeds in most non-drug cases, if the offense was committed before August 23, 2000.

III. RESTRAINING ORDERS

A. Pre-Trial Restraint of Assets

Section 853(e) permits the court to issue both pre-indictment and post-indictment restraining orders.

- this is an alternative to seizing the property with either a civil forfeiture warrant (18 U.S.C. 981(b)) or a criminal forfeiture warrant (Section 853(f));

    - *United States v. Walker*, 943 F. Supp. 1326 (D. Col. 1996) (§ 853(f) requires showing that restraining order would not be adequate to preserve the property);

Pre-indictment restraining orders are relatively rare:

— the *ex parte* TRO is good for only 10 days; 21 U.S.C. § 853(e)(2)

— then the target gets a hearing to determine if the restraint should be continued for another 90 days; 21 U.S.C. § 853(e)(1)(B)

- *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (the Government gets preindictment order *ex parte*; defendant gets hearing on the Government's motion to continue the order for 90 days);

- *In Re: Certain Assets of Allen Petty, Jr.,* 2002 WL 1377707 (E.D. Tex. 2002) (court enters ex parte TRO under § 853(e)(2) and converts it to preliminary injunction under § 853(e)(1)(B) following hearing where Government was required to prove likelihood of success on the merits, etc.);

— an alternative that avoids the hearing and the deadline is to seize the property for *civil forfeiture*, commence a civil case pursuant to CAFRA, and stay that case pending the conclusion of the criminal trial; *see* 18 U.S.C. § 981(g)

Much more common are post-indictment restraining orders

— no pre-restraint hearing is required; the Government simply files an *ex parte* application stating that an indictment has been returned and that the property in question will be subject to forfeiture if the defendant is convicted

- *United States v. Acord*, 47 F. Supp. 2d 1339 (M.D. Ala. 1999) (post-indictment restraining order may be issued *ex parte* to preserve the government's interest in movable property, such as an automobile);

— and the order remains in effect through trial, unless modified by the court

- *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (*ex parte* order remains in effect through trial unless the court grants defendant a hearing and agrees to modify the order); *United States v. Jamieson*, 189 F. Supp.2d 754 (N.D. Ohio 2002) (same);

- *United States v. Gelb*, 826 F.2d 1175, 1176 (2nd Cir. 1987) (pre-indictment restraining order is akin to a preliminary injunction in that it remains in effect through the duration of the criminal trial);

There are several recurring issues with respect to post-indictment restraining orders:

1. Does the defendant have a right to a *post-restraint* hearing?

— the courts are split on this:

— the Eleventh Circuit says no, the defendant can contest the forfeiture at trial and doesn't need to be given an opportunity to contest the restraining order before then

- *United States v. Bissell*, 866 F.2d 1343, 1354 (11th Cir. 1989) (no post-restraint hearing required, even if the Sixth Amendment is implicated);

- *but see United States v. Register*, 182 F.3d 820 (11th Cir. 1999) (*dicta*) (noting that the Eleventh Circuit is the only court to hold that no post-restraint hearing is required even if the Sixth Amendment rights are implicated, and suggesting *Bissell* may need to be revisited);

--- most courts hold that a post-restraint hearing is required *if the Sixth Amendment is implicated*:

- *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds, other than the restrained assets, to hire private counsel or to pay for living expenses, but if he makes this showing, he is entitled to a hearing);

- *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (hearing is required when defendant raises 6th Amendment issue and demonstrates lack of alternative source of funds to hire counsel);

- *United States v. Jamieson*, 189 F. Supp.2d 703 (N.D. Ohio 2002) (same, following *Jones*; to satisfy 6th Amendment requirement, defendant must show he has no access to funds from friends or family; Government has right to rebut showing of lack of funds if hearing is granted);

- *United States v. Monsanto*, 924 F.2d 1186, 1195-97 (2d Cir. 1991) (post-restraint hearing required if defendant needs restrained property to hire counsel in the criminal case); *United States v. Moya-Gomez*, 860 F.2d 706, 729 (7th Cir. 1988) (same); *United States v. Thier*, 801 F.2d 1463, 1469 (5th Cir. 1986); *United States v. Unimex, Inc.,* 991 F.2d 546, 551 (9th Cir. 1993); *United States v. Crozier*, 777 F.2d 1376, 1383-84 (9th Cir. 1985); *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987);

— notice that the burden is on the defendant to show that he has no other funds

- *United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001) (defendant entitled to pretrial hearing if property is seized for civil forfeiture if he demonstrates that he has no other assets available; following *Jones*);

What if the defendant has money for counsel but just wants to challenge the restraining order?

— the courts are split as to whether a post-restraint hearing is necessary if 6th Amendment rights are *not* implicated.

- *United States v. Musson*, 802 F.2d 384, 387 (10th Cir. 1986) (no hearing required); *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) (reaffirming *Musson* on this point);

- *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) (agreeing with *Jones*; defendant gets no hearing unless he demonstrates that he lacks an alternative source of funds to hire counsel);

- *United States v. Kirschenbaum*, 156 F.3d 784, 793 (7th Cir. 1998) (whether post-restraint hearing is required by Fifth Amendment due process when there is no Sixth Amendment issue is an open question in the Seventh Circuit; noting that Second Circuit's decision in *Monsanto* could be read either way);

2. What are the issues at the post-restraint hearing?

Suppose the defendant succeeds in convincing the court that he is entitled to challenge the restraining order:

— that means he has a right to a hearing; but what is the hearing about? And what procedures apply?

Most courts hold that a restraining order under § 853(e)(1)(A) will be continued if the Government has probable cause to believe the property will be subject to forfeiture if the defendant is convicted

- *United States v. Monsanto*, 491 U.S. 600 (1989) (standard for issuance of restraining order is probable cause);

- *United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001) (the only issues in the pretrial hearing are whether defendant lacks any other assets to hire counsel, and if so, whether there is probable cause to believe the restrained assets are subject to forfeiture);

- *United States v. Jamieson*, 189 F. Supp.2d 754 (N.D. Ohio 2002) (Rule 65 does not apply to post-indictment restraining orders);

— but notice that some of the older cases – decided before the Supreme Court decided *Monsanto* – held that Rule 65, F.R.Civ.P., governs criminal restraining orders

- *United States v. Crozier*, 777 F.2d 1376, 1384 (9th Cir. 1985) (Rule 65 governs hearing on pre-trial restraining orders); *United States v. Thier*, 801 F.2d 1463, 1468 (5th Cir. 1986) (same);

One thing is clear: if the Government satisfies the probable cause burden, the property remains under restraint *even if the defendant has no other funds for attorneys fees*

- *United States v. Monsanto, supra*

Who has the burden of proof?

— Most courts put the burden on the Government to establish probable cause:

- *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) (the Government has ultimate burden of establishing probable cause on forfeitability issue in pretrial hearing, but only after defendant makes *prima facie* showing that he has bona fide reason to believe the property is *not* traceable to the offense);

- *United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001) (to sustain a pretrial restraining order, the Government's burden is to establish probable cause to believe that the property is subject to forfeiture);

- *But see United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001) (defendant who challenges pre-trial restraint of forfeitable property has burden of establish first that he has no other assets available to hire counsel, and second that he Government lacks probable cause for the restraint of the property);

Can we rely on the grand jury's finding of probable cause:

— the legislative history says that we can:

"For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based." S.Rep. No. 225, 98th Cong., 2d Sess. 203 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3386.

— the Fourth Circuit says that this means we can rely on the grand jury's probable cause finding with respect to all aspects of the indictment, including its finding that the property is subject to forfeiture (hence the importance of presenting evidence relating to forfeiture to the grand jury):

- *United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001) (the grand jury's finding of probable cause is sufficient to satisfy the Government's burden); *In Re Billman*, 915 F.2d 916, 919 (4th Cir. 1990) (same);

– Other courts permit reliance on the grand jury's finding only as to probable cause for the underlying criminal offense:

- *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) (defendant may challenge grand jury's finding of probable cause to believe the restrained property is traceable to the offense, but he may not challenge the grand jury's finding of probable cause regarding the underlying crime); *United States v. Jamieson*, 189 F. Supp.2d 754 (N.D. Ohio 2002) (same);

- *United States v. Lugo*, 63 F. Supp. 2d 896, 897 n.2 (N.D. Ill. 1999) (in "facilitating property" case, defendant can challenge restraining order on the ground that the Government restrained the wrong vehicles, but cannot argue that the underlying crime did not occur or that no vehicles were involved in that crime);

— the Second Circuit allows the defendant to challenge the probable cause on all grounds:

- *United States v. Monsanto*, 924 F.2d 1186, 1195-97 (2d Cir. 1991) (court required to review probable cause to believe defendant had committed the underlying crime);

What evidence is admissible?

— § 853(e)(3) expressly permits hearsay to be admitted

- *United States v. Jamieson*, 189 F. Supp.2d 754 (N.D. Ohio 2002) (Federal Rules of Evidence do not apply at hearing challenging restraining order);

3. Can we restrain the assets of third parties?

The prevailing view is that property held by third parties may be restrained to preserve the government's interest:

- *United States v. Jenkins*, 974 F.2d 32 (5th Cir. 1992); *In Re Billman*, 915 F.2d 916 (4th Cir. 1990); *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988).

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp.2d 36 (D.D.C. 1999) (pursuant to § 1963(e), court may appoint trustee to liquidate assets of corporation where such liquidation is necessary for gov't to realize defendant's 61 percent interest);

-- but some courts decline to restrain property held by third parties or to make restraining orders apply to third parties:

- *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (restraining orders are directed at people, not property; defendant may be enjoined from taking action with respect to property subject to forfeiture, but such order applies only to defendant and his agents; order seeking to enjoin defendant's wife is void, but person who knowingly aids defendant in violating restraining order may be held in contempt);

- *United States v. Lugo*, 63 F. Supp. 2d 896, 897 n.2 (N.D. Ill. 1999) (following *Kirschenbaum;* order restraining drug defendant's use of two vehicles applied to his agents and employees, and others acting in concert, but cannot restrain family members or other third parties);

Whether third parties whose assets are restrained can contest the restraining order is a complicated issue we won't get into here.

4. Can the restraining order be used to force the defendant to repatriate assets from a foreign country?

21 U.S.C. § 853(e)(4) specifically authorizes the court to include a repatriation order in a pretrial restraining order:

- *United States v. Sellers*, 848 F. Supp. 73, 77 (E.D. La. 1994) (no Fifth Amendment violation if the Government does not use evidence of the repatriation in its case in chief);

5. Can the court restraint substitute assets?

We know that one of the key differences between civil and criminal forfeiture is that civil forfeiture is limited to the property traceable to the offense, while criminal forfeiture allows the court to impose money judgments and to forfeit substitute assets.

— but what about in the pre-trial context?

— can *any property* that can be forfeited after conviction be restrained pre-trial? Or is the pre-trial restraint limited to the traceable property?

It seems totally inconsistent with the nature of criminal forfeiture to say that substitute property can be forfeited post-trial, but that only traceable property can be restrained pre-trial

— but that is the majority rule:

Cases holding restraint of substitute assets permitted:

- *In Re Billman*, 915 F.2d 916 (4th Cir. 1990); *United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001);

- *United States v. Scardino*, 956 F. Supp. 774 (N.D. Ill. 1997) (holding that reference to "subsection (a)" property in § 853(c) applies to substitute assets, and stating, in *dicta*, that the same would apply to pre-trial restraint under § 853(e));

- *United States v. O'Brien*, 836 F. Supp. 438 (S.D. Ohio 1993) (government entitled to pre-trial order restraining substitute assets);

Cases holding restraint *not* permitted:

- *United States v. Gotti*, 155 F.3d 144 (2d Cir. 1998); *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993); *In Re Assets of Martin*, 1 F.3d 1351 (3rd Cir. 1993); *United States v.*

Ripinsky, 20 F.3d 359 (9th Cir. 1994); *United States v. Field*, 62 F.3d 246 (8th Cir. 1995);

- *In Re: Account Nos. . . . Located at Bank One*, 9 F. Supp.2d 1015 (E.D. Wis. 1998) (pre-indictment restraint of substitute assets not permitted);

Because, in most circuits, substitute assets cannot be restrained, there may seem to be no reason, in those circuits, to name the substitute asset in the indictment

— it only tells the bad guy that he has only a few months to get rid of his property before we forfeit it

- *United States v. Bollin*, 264 F.3d 391, 422 n.21 (4th Cir. 2001) (substitute assets need not be listed in the indictment);

— but naming the substitute asset in the indictment puts third parties on notice that it will be forfeited, possibly negating their claims in the ancillary proceeding if the defendant does transfer it to them.

- *United States v. Strube*, 58 F. Supp. 2d 576 (M.D. Pa. 1999) (unless third party is a bona fide purchaser, he may not defeat the forfeiture of substitute assets under section 853(n)(6)(B));

Remember, if the property is directly forfeitable, there is no need to apply the rule against pre-trial restraint of substitute assets.

- *United States v. Stewart*, 185 F.3d 112 (3rd Cir. 1999) (if the money is forfeitable as criminal proceeds, and not as substitute assets, there was nothing improper about the pre-trial restraint);

IV. Guilty Pleas

Defendant, in plea agreement, can agree to forfeit any property derived from / involved in / used to commit the offense to which he is pleading guilty

- if there was no forfeiture allegation in the indictment for that offense, have the defendant plead to a criminal information that contains such an allegation

- possibly, a defendant could waive the notice provision in Rule 32.2(a) and agree to the forfeiture anyway, but this is an untested theory

If the offense occurred before August 23, 2000, defendant probably can plead and agree to the criminal forfeiture by waiving the *ex post facto* objection

- but this is also an untested theory

The Supreme Court has held that because Rule 11(f) does not apply to forfeiture, the court need not make a finding that the forfeiture is supported by the evidence:

- *Libretti v. United States*, 516 U.S. 29, 116 S. Ct. 356 (1995);

— but the better practice is to put the evidence establishing the nexus between the property and the offense before the court.

If criminal forfeiture is impossible, the defendant can be required to agree not to contest a parallel civil forfeiture.

- *United States v. Contents of Account Number 901121707*, 36 F. Supp.2d 614 (S.D.N.Y. 1999) (defendant pleads guilty to structuring offense, and agrees not to contest civil forfeiture under 981(a)(1)(A));

The defendant, however, cannot agree to forfeit his wife's property

- if a third party's agreement not to contest the forfeiture is part of the deal, the third party should sign the plea agreement and should be represented by counsel

- *Christunas v. United States*, 61 F. Supp. 2d 642 (E.D. Mich. 1999) (wife's apparent consent to forfeiture of her interest in real property was void because wife did not sign consent decree and was not represented by her husband's attorney).

Nor can the defendant be penalized for failing to convince his wife not to contest the forfeiture of her part of the property in the ancillary proceeding

- *United States v. Bennett*, 252 F.3d 559 (2d Cir. 2001) (district court may not penalize a defendant by enhancing his sentence when a third party refuses to withdraw a petition contesting the forfeiture in the ancillary proceeding, but it may enhance his sentence as punishment for transferring the property to the third party in the first place);

But the defendant should be required to recite, as part of the plea agreement, that the property belongs to him, and that he not only agrees to the forfeiture, but agrees to assist the Government in opposing any claims by third parties.

Once the court accepts the guilty plea, it can enter a preliminary order of forfeiture under Rule 32.2(b) in the same manner as it would if the jury had just returned a special verdict of forfeiture at trial

- the procedure for converting the preliminary order to an order that is final as to the defendant is described below

V. TRIAL PROCEDURE

A. Bifurcated Proceeding

Before Rule 32.2 took effect, courts were divided as to whether bifurcation of a jury trial was required

- but Rule 32.2(b)(1) resolves this issue by providing that the forfeiture proceeding takes place "as soon as practicable" after the court enters a guilty verdict

- in other words, the trial must be bifurcated

B. Right to a Jury Trial

When Rule 32.2 was first proposed, it was meant to do away with the right to a jury trial on the forfeiture issue

- the notion was that the Supreme Court's decision in *Libretti,* holding that there was no constitutional right to a jury trial of the forfeiture issue because forfeiture was part of sentencing, gave the green light to efforts to repeal old Rule 31(e)

    - *Libretti v. United States*, 516 U.S. 29, 116 S. Ct. 356 (1995) (because right to have jury determine forfeitability is statutory, not constitutional, defendant's waiver of jury right need not be knowing and informed);

- what was originally proposed was the language in Rule 32.2(b)(1), which says that "the court" determines whether the requisite nexus has been established, and "the court" determines the amount of any money judgment

But the Standing Committee on the Criminal Rules did not approve that version, and insisted that the jury right be preserved, at the defendant's option

- for that reason, while paragraph(1) remained the same, the Committee added paragraph (4) which says the following:

    Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

The things to notice are:

-- the default is that the forfeiture is tried to the court: a party must request a jury trial on the forfeiture if the party wants one;

- *United States v. Davis*, 177 F. Supp.2d 470 (E.D. Va. 2001) (under Rule 32.2(b)(4), defendant must make a specific request to have the jury retained to determine the forfeiture; a general request for a jury trial at the time of arraignment is not sufficient; defendant, who stood silent while the jury was dismissed, waived his right to have the jury determine the forfeiture and could not request that a new jury be empaneled);

– the Government has an equal right to demand a jury trial

C. Burden of Proof for Criminal Forfeiture

Preponderance standard applies:

— notwithstanding the Supreme Court's decision in *Apprendi*, all courts that have considered the issue have held that the Government's burden in the forfeiture phase of the trial is to prove the nexus by a preponderance of the evidence

- *United States v. Vera*, 278 F.3d 672 (7th Cir. 2002) (like restitution, forfeiture has no statutory maximum; it is open-ended; thus a forfeiture of property described by a criminal forfeiture statute can never exceed the statutory maximum in a way that makes *Apprendi* applicable; the preponderance of the evidence standard still applies);

- *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (*Corrado I*) (*Apprendi* does not apply to criminal forfeiture; under *Libretti*, forfeiture is an aspect of the sentence, not a separate offense; therefore, forfeiture need not be submitted to a jury or proved beyond a reasonable doubt); *United States v. Corrado*, 286 F.3d 934 (6th Cir. 2002) (*Corrado II)* (petition for rehearing denied);

- *United States v. Najjar*, ___ F.3d ___, 2002 WL 1792090 (4th Cir. Aug. 6, 2002) (because forfeiture is part of the punishment,standard of proof for RICO forfeiture remains preponderance of the evidence, notwithstanding *Apprendi*); *United States v. Powell*, 2001 WL 51010 (4th Cir. 2001) (Table) (same);

- *United States v. Cabeza*, 258 F.3d 1256 (11th Cir. 2001) (same, following *Corrado* and *Powell*);

- *Ida v. United States,* 2002 WL 1203855 (S.D.N.Y. 2002) (*Libretti* rejected the notion that forfeiture has "elements" that must be submitted to a jury; as *Apprendi* does not even mention forfeiture, it did not overrule *Libretti*; thus the preponderance standard still applies in the Second Circuit);

- *United States v. Davis*, 177 F. Supp.2d 470 (E.D. Va. 2001) (following *Corrado* and *Cabeza*; preponderance standard still applies in the Fourth Circuit);

- *United States v. Cianci*, ___ F. Supp.2d ___, 2002 WL 1987635 (D.R.I. Aug. 8, 2002) (because forfeiture is part of sentencing, preponderance of the evidence applies to RICO forfeitures; *Apprendi* does not apply because there is no statutorily prescribed maximum forfeiture);

At least one court has held that because the forfeiture phase of the trial is part of sentencing, hearsay is admissible:

- *United States v. Gaskin*, 2002 WL 459005 (W.D.N.Y. 2002) (in the forfeiture phase of the trial, the parties may offer evidence not already in the record, and because forfeiture is part of sentencing, such evidence may include reliable hearsay);

D. Special Verdict / Ownership Issue

The purpose of the forfeiture phase of the trial is to establish, by a preponderance of the evidence, that the property you want to forfeit was in fact derived from, or used to commit, the crime for which the defendant has been found guilty.

— to determine what you have to prove, you must look at the language of the forfeiture statute that you tracked when you drafted the indictment

— in a fraud case (18 U.S.C. § 981(a)(1)(C)), you have to prove that the property is the "proceeds" of the offense

— in a money laundering case (§ 982(a)(1)), you have to prove that the property was "involved in" the money laundering offense

— in a drug case (21 U.S.C. § 853(a)(1)&(2)), you have to prove that the property was either the proceeds of the offense, or property used to facilitate the offense

Procedurally, you put on your evidence (to the extent you haven't already done so in the case-in-chief), and the defendant puts on his

- *United States v. Merold*, 2002 WL _____ (11th Cir. Aug. 6, 2002) (Table) (jury may rely on evidence admitted in the guilt phase of the trial);

— then there is argument, another set of jury instructions, and the jury gets a special verdict form

The form should have an entry for each item you want to forfeit:

— Q. Has the Government established by a preponderance of the evidence that the 2001 Lexus automobile was used to facilitate the offense alleged in Count 7 of the Indictment? Yes or No.

To the extent that you're unable to locate a specific asset, but you nevertheless can calculate the amount of proceeds the defendant derived from the scheme, you can ask the jury to determine the amount the defendant should be ordered to pay in a money judgment.

— Q. Has the Government established, by a preponderance of the evidence, that the defendant derived $100,000 as proceeds of the offense alleged in Count 3 of the Indictment? Yes or No.

  If NO, then what was the value of the proceeds that the defendant did derive from the offense? $_____.

Rule 32.2(b) makes clear, however, that the nexus between the property and the offense is the *only* thing that the jury is asked to determine.

— in the past, there was a question as to whether the finder of fact – whether it be the court or the jury – was also supposed to determine if the defendant was the owner of the property

- the Commentary to Rule 32.2 describes this controversy at length, and notes the division in the case law

- some cases said the jury had to determine both nexus and ownership, while others said the jury's role was to determine nexus only

  - *Compare United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (forfeiture order is fatally flawed if jury was not asked to determine how much of the property belonged to each defendant, and how much to third parties) *with United States v. Frye*, 202 F.2d 270, 2000 WL 32029 (6th Cir. 2000) (Table) (as long as the Government complies with Rule 7(c)(2) and puts defendant on notice that all of his interest is subject to forfeiture, defendant cannot complain that jury did not determine extent of his interest; jury's finding on nexus issue is sufficient to support forfeiture of all of defendant's interest);

The Commentary to Rule 32.2 explains that it makes no sense for the court (or the jury) to determine the ownership issue in the Government's case, because the same issue only has to be litigated all over again if a third party files a claim asserting a superior ownership interest in the ancillary proceeding

- in the end, Rule 32.2(b)(1) provides only that the finder of fact must determine "whether the Government has established the requisite nexus between the property and the offense"), while Rule 32.2(b)(2) provides that the determination of the extent of the defendant's interest *vis a vis* third parties is deferred to the ancillary proceeding):

> If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture setting forth the amount of any money -judgment or directing- the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest shall be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

- so, the jury's role is only to determine if the nexus between the property and the offense has been established; it is *not* to be concerned with whether the defendant had an ownership interest in the property

  - *United States v. Gaskin*, 2002 WL 459005 *9 n.4 (W.D.N.Y. 2002) (ownership is a question for the court alone to determine in the ancillary proceeding);

  - *United States v. Cianci*, ___ F. Supp.2d ___, 2002 WL 1987635 (D.R.I. Aug. 8, 2002) (under Rule 32.2(b)(2), the determination of the nexus between the property and the offense is made without regard to any legitimate interest that a third party might have because "the Rule affords third parties the opportunity to assert such claims before a final forfeiture order is entered");

  - *See also* Advisory Committee Note (2000) (discussing reason for eliminating confusion over whether extent of defendant's ownership interest should be determined by the jury, and for providing that under the new rule the court simply enters an

order of forfeiture "of whatever interest a defendant may have in the property without having to determine exactly what that interest is");

This is intended not only to avoid repetitious litigation – i.e., litigating the ownership issue first in the case-in-chief and again in the ancillary proceeding – but also to preclude a defendant from objecting that the forfeiture on the ground that the property did not belong to him

- our view has been that if the defendant says he does not own the property, then he has no standing to object to the forfeiture

  - *United States v. Saccoccia*, 62 F. Supp.2d 539 (D.R.I. 1999) (defendant lacks standing to object to forfeiture of property as substitute assets on the ground that the property does not belong to him);

- Rule 32.2(b)(2) makes this clear, and the Commentary to that provision reinforces it:

  "The defendant would have no standing to object to the forfeiture on the ground that the property belonged to someone else."

Be aware, however, that Rule 32.2 contains a peculiar procedure for what happens if no third party files a claim in the ancillary proceeding

- the Committee was content to allow the ownership issue to be deferred to the ancillary proceeding, as Rule 32.2(b)(2) provides;

- but they didn't want to create a situation where the Government could forfeit just any property connected to the offense, regardless of who the owner was

- that would convert a criminal forfeiture into a civil *in rem* forfeiture

So, if no one files a claim in the ancillary proceeding, and the ownership issue is thus not being litigated by any

party, the court must nevertheless satisfy itself that at least one defendant had an interest in the property.

- Rule 32.2(c)(2) says the following:

> If no third party files a timely claim, the preliminary order becomes the final order of forfeiture, if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole or in part, to a codefendant or third party, nor may a third pay object to the final order on the ground that the third party had an interest in the property.

- note once again that even at this stage, the defendant does not get to object to the forfeiture on the ground that the property really belonged to his girlfriend

- nor does the court have to worry about determining whether the property belonged to Defendant A or Defendant B.

The trial phase of a criminal forfeiture involves only the defendant; third parties must await the ancillary proceeding to contest the forfeiture, *see* 21 U.S.C. § 853(k).

— so just as the defendant cannot object to the forfeiture on the ground that the property really belongs to his wife, neither can the wife intervene in the case at this stage

— she must wait for the ancillary proceeding

- *United States v. Pelullo*, 178 F.3d 196 (3rd Cir. 1999) (criminal forfeiture occurs in two steps: first, the jury determines the forfeitability of the property and the district court enters an order of forfeiture; second, third parties assert their interests in an ancillary proceeding);

- *United States v. Gilbert*, 244 F.3d 888, 910 n.48 (11th Cir. 2001) (ancillary proceeding is "exclusive means" for third parties to assert claims to forfeited property);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of ICIC Investments)*, 795 F. Supp. 477, 479 (D.D.C. 1992) (third party lacks standing to object to entry of order of forfeiture); *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (same);

VI. ORDER OF FORFEITURE / SENTENCING

A. In General

Forfeiture is mandatory:

- *United States v. Monsanto*, 491 U.S. 600, 606 (1989) ("Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied …");

- *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (*Corrado I*) (forfeiture is a mandatory aspect of the sentence; district court erred in refusing to order forfeiture of "sufficiently quantifiable" proceeds of a RICO offense); *United States v. Corrado*, 286 F.3d 934 (6th Cir. 2002) (*Corrado II)* (same);

- *United States v. Gilbert*, 244 F.3d 888, 909 (11th Cir. 2001) ("forfeiture is a *mandatory* element of sentencing") (emphasis in original);

- *United States v. Johnston*, 199 F.3d 1015, 1022 (9th Cir. 1999) (criminal forfeiture is mandatory and designed to ensure that a defendant does not profit from his crimes);

- *United States v. Tencer*, 107 F.3d 1120, 1134 (5th Cir. 1997) (criminal forfeiture for money laundering under section 982(a)(1) is mandatory); *United States v. Hendrickson*, 22 F.3d 170, 175 (7th Cir. 1994) (same);

- *United States v. Bieri*, 68 F.3d 232, 235 (8th Cir. 1995) (under section 853(a)(2) criminal forfeiture of property used to facilitate a drug trafficking offense "is mandatory, not discretionary");

- *United States v. Hill*, 167 F.3d 1055 (6th Cir. 1999) (court may not ignore mandatory language of forfeiture statute and give defendant option of substituting cash for forfeited items, unless section 853(p) applies);

United States v. Hill, 2002 WL 31119692 (6th Cir. 2002) (TABLE) (same case, on appeal from modification of order of forfeiture to include substitute assets) (forfeiture of property involved in money laundering is mandatory);

- *United States v. Maxwell*, 399 F. Supp.2d 395, 399 n.2 (E.D. Va. 2002) (because criminal forfeiture is mandatory, the primary issue before the trial court is not whether to issue a forfeiture order, but its size and scope);

B. Preliminary order of forfeiture — Procedure

Rule 32.2(b)(3) provides that a preliminary order of forfeiture may be entered at any time after the conviction or guilty plea, and becomes final as to the defendant at sentencing.

- *United States v. Pelullo*, 178 F.3d 196 (3rd Cir. 1999) (preliminary order is final as to the defendant and divests him of any interest he had in the property, including property forfeited as a substitute asset; therefore, property did not become part of the bankruptcy estate);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp.2d 36 (D.D.C. 1999) (preliminary order transfers defendant's interest to the U.S. and is final as to the defendant at sentencing; it remains preliminary as to third parties until the ancillary proceeding is concluded);

The order is "preliminary" in two respects:

1) it is not final as to the defendant until the time of sentencing;

2) it is not final as to third parties until the conclusion of the ancillary proceeding

— once the order is made part of the sentence, it is "final" as to the defendant, but it remains "preliminary" as to the third parties

- *United States v. De Los Santos*, 260 F.3d 446 (5th Cir. 2001) (preliminary order of forfeiture is final as to defendant

and is immediately appealable; defendant cannot wait until court enters final order resolving rights of third parties) (collecting cases);

- *United States v. Christunas*, 126 F.3d 765 (6th Cir. 1997) (preliminary order of forfeiture is final pertaining to defendant and is immediately appealable, notwithstanding ongoing ancillary proceeding); *United States v. Bennett*, 147 F.3d 912 (9th Cir. 1998) (same);

Forfeiture must be included in the "verbal pronouncement" of defendant's sentence:

- *United States v. Gaviria*, 116 F.3d 1498 (D.C. Cir. 1997) (failure to announce the forfeiture portion of the defendant's sentence in his presence, as required by Rule 43(a), means that forfeiture order must be vacated);

- *United States v. Shannon*, 87 F.3d 1325, 1996 WL 341352 (9th Cir. 1996) (Table) (order of forfeiture vacated because judge failed to mention forfeiture at sentencing, even though forfeiture was included in indictment and plea agreement and court amended judgment eight days after sentencing to include order of forfeiture);

- *United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (forfeiture must be imposed in a proceeding where defendant has the right to allocution);

And it must be included in the J & C.

— Rule 32.2(b)(3) provides that the order of forfeiture "shall be made part of the sentence and included in the judgment."

Courts disagree as to what happens if the court fails to include forfeiture in the judgment

– some say the government's only remedy is to appeal.

- *United States v. Seltzer*, 199 F.3d 1324 (2d Cir. 1999) (Table) (when district court inadvertently failed to include forfeiture as part of the sentence, the Government's only remedy was to appeal; it could not wait six weeks and then move district court to amend the sentence);

- *United States v. Gilbert*, 244 F.3d 888, 925 n.81 (11th Cir. 2001) (because forfeiture is mandatory, Government may appeal any judgment that fails to contain an order of forfeiture as an illegal sentence; but if Government fails to take such appeal, it waives the forfeiture and the judgment becomes final);

— others say the Government can move to amendment the judgment under Rule 36:

- *United States v. Loe*, 248 F.3d 449 (5th Cir. 2001) (if district court forgets to include forfeiture in the judgment, it may, pursuant to Rule 36, Fed. R. Crim. P., amend the judgment *nunc pro tunc*; even if the judgment is not so amended, oral pronouncement of the forfeiture at the sentencing hearing is sufficient to comply with former Rule 32(d)(2));

– but the 8th Circuit holds that if the district court omits the preliminary order of forfeiture from the judgment, the time for the defendant's appeal never begins to run, and the Government can return to the district court to fix the problem

- *United States v. Covey,* 232 F.3d 641 (8th Cir. 2000) (defendant's appeal, on the merits, from order of forfeiture in money laundering case was premature because the preliminary order was not made part of the judgment at sentencing; case remanded for district court to include order of forfeiture in the judgment);

- *United States v. Coon*, 187 F.3d 888 (8th Cir. 1999) (preliminary order of forfeiture is final as to defendant, and immediately appealable, only if it is included in the judgment; because district court failed to make the forfeiture part of the sentence and include it in the judgment, the forfeiture order is still "preliminary" and not ripe for appeal);

If the defendant attempts to frustrate the forfeiture of his property, his sentence in the criminal case can be increased under the obstruction of justice provision of the Sentencing Guidelines:

- *United States v. Baker*, 227 F.3d 955 (7th Cir. 2000) (defendant's attempt to frustrate the forfeiture by transferring assets to a third party constitutes an

"obstruction of justice" warranting an increase in the sentencing offense level for the underlying criminal offense); *United States v. Keeling*, 235 F.3d 533 (10th Cir. 2000) (same, where defendant quitclaimed property to avoid forfeiture of substitute assets);

- *United States v. Carroll*, 2002 WL 1332795 (N.D. Ill. 2002) (obstruction of justice enhancement imposed on defendant who misled Probation Dept by falsely denying that certain assets were fraud proceeds in order to affect the court's forfeiture determination);

- *United States v. Jackson-Randolph*, 282 F.3d 369 (6th Cir. 2002) (defendant's transfer of her property to herself and husband as tenants by the entireties, knowing that such transfer would make criminal forfeiture of the property more difficult, was properly subject to the obstruction of justice enhancement);

C. Form of preliminary order

Court may order forfeiture of an amount of money, specific property, or substitute assets.

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (criminal forfeiture order may take several forms: money judgment, directly forfeitable property, and substitute assets);

- *See* Forms CRM5001, *et seq.*

Typically, if we have identified specific assets subject to forfeiture – *i.e.*, property that was restrained pre-trial and that the jury has found forfeitable in a special verdict form – we want to have that listed in the preliminary order of forfeiture.

— but as I said when we discussed the Special Verdict form, if all we know is the value of the property that was derived from or used to commit the offense, we can get a money judgment

- *United States v. Baker*, 227 F.3d 955 (7th Cir. 2000) (a forfeiture order may include a money judgment for the amount of money involved in the money laundering offense; the money judgment acts as a lien against the defendant personally for the duration of his prison term and beyond);

- *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (*Corrado I*) (remanding case to the district court to enter money judgment for the amount derived from a RICO offense);

- *United States v. Edwards*, ___ F.3d ___, 2002 WL 1967951 (5th Cir. Aug. 23, 2002) (court enters money judgment for amount jury found to be proceeds of racketeering activity);

- *United States v. Iacaboni*, ___ F. Supp.2d ___, 2002 WL 1880390 (D. Mass. Aug 13, 2002) (court enters money judgment equal to sum of amounts involved in all money laundering transactions making up the conspiracy to launder gambling proceeds, including salaries paid to co-defendants, overhead expenses and pay-outs to winning bettors);

In unusual cases, the preliminary order of forfeiture may simply describe the property generically, and leave it to post-conviction discovery to identify the specific assets subject to forfeiture:

— in such cases, the Government may move to amend the order to include the forfeitable property once it finds it: *see* Rule 32.2(e).

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp.2d 36 (D.D.C. 1999) (just as a preliminary order in a drug case may direct the forfeiture of all "proceeds" up to a specific amount, but not identify specific assets, the preliminary order in a RICO case may direct the forfeiture of "all property acquired or maintained" or "affording a source of influence;" the gov't then uses post-trial discovery to identify specific assets and moves to amend the preliminary order to include them);

D. Joint and Several Liability

All defendants are liable to forfeit the total amount of money laundered by the organization or obtained as criminal proceeds:

- *United States v. Pitt*, 193 F.3d 751, 765 (3d Cir. 1999) (sections 853 and 982 both impose joint and several liability on convicted defendants; district court did not err in converting special verdict, in which jury found each defendant liable for a specific sum, into a judgment making both defendants liable for the aggregate amount);

- *United States v. Simmons*, 154 F.3d 765 (8th Cir. 1998) (each defendant is jointly and severally liable for all foreseeable proceeds of the scheme; the Government is not required to prove the specific portion of proceeds for which each defendant is responsible; RICO defendant cannot limit his liability to proceeds of the racketeering acts he was charged with committing personally);

- *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (*Corrado I*) (all defendants in a RICO case are jointly and severally liable for the total amount derived from the scheme; the Government is not required to show that the defendants shared the proceeds of the offense among themselves, nor to establish how much was distributed to a particular defendant); *United States v. Corrado*, 286 F.3d 934 (6th Cir. 2002) (*Corrado II)* (same; because person who collected the proceeds was able do so because of his participation in a scheme, all members of the scheme are jointly and severally liable);

- *United States v. Edwards*, ___ F.3d ___, 2002 WL 1967951 (5th Cir. Aug. 23, 2002) (following *Corrado I*; defendant, who was not personally involved in one part of the racketeering activity, is jointly and severally liable for money judgment that included the proceeds of that part of the offense, because co-defendant's commission of it was foreseeable to him);

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (all co-defendants held jointly and severally liable for $6 million money judgment in drug case; even minor participants in drug conspiracy are jointly and severally liable for forfeiture of the full amount of the proceeds);

- *United States v. Bollin*, 264 F.3d 391(4th Cir. 2001) (even minor participant who received only $30,000 for his role in

the scheme may be liable for full $1.2 million judgment if the laundering of that amount was foreseeable to him; forfeiture of such foreseeable amount does not violation the Excessive Fines Clause);

E. Substitute Assets

Substitute assets may be forfeited to satisfy money judgment:

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (once the gov't has obtained a money judgment, it may forfeit defendant's real property in partial satisfaction of that judgment);

- *United States v. Numisgroup Intl. Corp*, 169 F. Supp. 2d 133 (E.D.N.Y. 2001) (Rule 32.2(e) authorizes forfeiture of substitute assets to satisfy a money judgment, including a judgment based on the value of the missing proceeds and the value of the missing facilitating property);

- *United States v. Harrison*, 2001 WL 803695 (N.D. Ill. 2001) (entry of money judgment as part of preliminary order of forfeiture gives Government opportunity later to satisfy the judgment by seeking forfeiture of substitute assets; Rule 32.2(e));

Order of forfeiture for substitute assets must be satisfied out of something not itself subject to forfeiture; otherwise forfeiture order would be satisfied out of something that belongs to the United States, rendering substitute assets provision meaningless.

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (absence of a nexus between the substitute asset and the offense is irrelevant; if there were a nexus, it would not be necessary to invoke the substitute assets theory);

- *United States v. Davis*, 177 F. Supp.2d 470 (E.D. Va. 2001) (if property cannot be forfeited as directly traceable to the offense, it can be forfeited as a substitute asset and used to satisfy the money judgment);

- *United States v. McCorkle*, No. 6:98-CR-52-ORL-19JGG (M.D. Fla. Jan. 8, 2001) (there is no bar against forfeiture—as a

substitute asset—of the property the jury declined to find subject to direct forfeiture);

Prosecutor can switch theories of forfeiture — from direct forfeiture to substitute assets.

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (there was nothing improper in prosecutor's decision to move to strike property from the forfeiture allegation before it was submitted to the jury, and later seeking forfeiture of same property as a substitute asset);

- *United States v. McCorkle*, No. 6:98-CR-52-ORL-19JGG (M.D. Fla. Jan. 8, 2001) (prosecutor can drop civil forfeiture case against an asset and seek forfeiture of same property as substitute asset in criminal case);

F. Procedure for obtaining substitute assets

Rule 32.2(e) provides unambiguously that the forfeiture of substitute assets is a matter for the court, not the jury

- it is also clear from the use of the mandatory language in Rule 32.2(e)(2) that the forfeiture of substitute assets is mandatory, not discretionary, once the Government makes the necessary showing that the requirements of § 853(p) are satisfied.

  - *United States v. Bollin*, 264 F.3d 391 (4th Cir. 2001) (Congress requires forfeiture of property as a substitute asset; the forfeiture judgment that the substitute asset is used to satisfy is part of the defendant's criminal sentence; cannot insulate certain types of property from forfeiture as a substitute asset);

  - *United States v. McCorkle*, No. 6:98-CR-52-ORL-19JGG (M.D. Fla. Jan. 8, 2001) (court cannot be concerned with defendant's claim that the forfeiture of jewelry as a substitute asset would do irreparable harm—in the event defendant is successful in overturning conviction on appeal—because forfeiture of substitute asset is mandatory once elements of section 853(p) are satisfied);

The defense attorney cannot object that substitute assets are needed to pay his fee:

- *United States v. Numisgroup Intl. Corp*, 169 F. Supp. 2d 133 (E.D.N.Y. 2001) (Supreme Court's decision in *Monsanto* applies with even greater force to post-conviction restraint of property, including property forfeitable as substitute assets);

- *United States v. Stewart*, 1998 WL 961363 (E.D. Pa. 1998) (*Caplin & Drysdale* applies to substitute assets), *order aff'd*, 189 F.3d 465 (3d Cir. 1999); *United States v. O'Brien*, 181 F.3d 105, 1999 WL 357755 (6th Cir. 1999) (Table) (same);

- *United States v. Helms*, 2001 WL 1057751 (W.D. Va. 2001) (same; assets restrained pretrial as substitute assets are not available for attorneys' fees unless there is reason to believe that they won't be forfeited);

Rule 32.2(e)(2) also makes it clear that whenever a court modifies an order of forfeiture to include a substitute asset, it must conduct an ancillary proceeding

- *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996);

- *United States v. Morgan*, 224 F.3d 339 (4th Cir. 2000) (wife challenges forfeiture of joint bank accounts as substitute assets);

G. Property Transferred to Third Parties

Transactions transferring forfeitable property to third parties may be voided under the relation-back doctrine.

- *See* 21 U.S.C. § 853(c).

- *United States v. Gilbert*, 244 F.3d 888, 902 n.38 (11th Cir. 2001) (under the relation back doctrine, Government's interest dates back to the time of the act that made the property subject to forfeiture; Congress included the provision to prevent a defendant from attempting to transfer his property to a third party prior to his conviction; third party who objects to application of the relation back doctrine must file a claim in the ancillary proceeding);

– so, if you have established that the property was subject to forfeiture in the forfeiture phase of the trial – or pursuant to a guilty plea – you can have it

named in the preliminary order of forfeiture, even if it has been transferred to a third party

- the procedure is to give the third party notice of the preliminary order and let him/her file a claim in the ancillary proceeding

  - *United States v. Bennett*, 252 F.3d 559 (2d Cir. 2001) (the procedure for recovering criminal proceeds transferred by a defendant to a third party is codified at sections 853(c) and (n)(6)(B); the Government forfeits the property in the criminal case, subject to the third party's right to contest the forfeiture in the ancillary proceeding);

  - *United States v. McCorkle,* 143 F. Supp.2d 1311, 1318 (M.D. Fla. 2001) (any property of the defendant that is subsequently transferred to a third party may be the subject of a special verdict of forfeiture; the district court thereafter orders the forfeiture of the property, subject to any claim made by the transferee in the ancillary proceeding; *United States v. McCorkle*, 2000 WL 133759 (M.D. Fla. 2000) (same);

The court should also order the third party to turn the property over to the court or to the Marshals Service pending the conclusion of the ancillary proceeding

  - *United States v. McCorkle*, 2000 WL 33725124 (M.D. Fla. 2000) (district court retains jurisdiction to hold third party in contempt for refusal to disgorge forfeited funds, even though third party has filed notice of appeal from denial of his petition in the ancillary proceeding);

If third party has dissipated forfeitable property, the government may file a conversion action in federal court to recover the property.

  - *United States v. Swiss American Bank*, 191 F.3d 30 (1st Cir. 1999) (the U.S. has a cause of action in conversion and unjust enrichment against a third party who receives property subject to criminal forfeiture and converts it to his own use, and may file suit in federal court because the action arises under federal law; Rule 4(k)(2) gives the court personal jurisdiction over third parties located outside of the U.S.);

- *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660 (4th Cir. 1996) (conversion action under Virginia tort law may be based on government's rightful ownership of forfeitable property under the relation back doctrine, and filed in federal court), rev'g 875 F. Supp. 1190 (E.D. Va. 1995) (Moffitt IV).

Or the Government can sue to recover the property under the Federal Debt Collection Act:

- *United States v. Maxwell*, ___ F. Supp.2d ___, 2002 WL 452094 (E.D. Va. March 21, 2002) (when defendant transfers his real property to third party to prevent Government from using it to satisfy money judgment, Government may sue to void the transfer under 28 U.S.C. § 3304(b) and 3306(a));

H. Affect on Sentencing

Forfeiture is not a basis for a downward departure from the U.S. Sentencing Guidelines.

- *United States v. Shalash*, 36 F. Supp.2d 1013 (S.D. Ohio 1999) (§5E1.4 shows that the sentencing commission intended for forfeitures to be considered separate and apart from sentencing; therefore forfeiture of the family residence cannot be a valid basis for downward departure (collecting cases));

FORFEITURE FOR COUNTS 2 - 49

1. Pursuant to Title 18, United States Code, Section 982(a)(1), each defendant who is convicted of one or more of the offenses set forth in Counts Two through Forty-nine shall forfeit to the United States the following property:

a. All right, title, and interest in any and all property involved in each offense in violation of Title 18, United States Code, Section 1956, or conspiracy to commit such offense, for which the defendant is convicted, and all property traceable to such property, including the following: 1) all money or other property

that was the subject of each transaction, transportation, transmission or transfer in violation of Section 1956(a)(1) or (2); 2) all commissions, fees and other property constituting proceeds obtained as a result of those violations; and 3) all property used in any manner or part to commit or to facilitate the commission of those violations.

b. A sum of money equal to the total amount of money involved in each offense, or conspiracy to commit such offense, for which the defendant is convicted. If more than one defendant is convicted of an offense, the defendants so convicted are jointly and severally liable for the amount involved in such offense.

2. Pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b), each defendant shall forfeit substitute property, up to the value of the amount described in paragraph 1, if, by any act or omission of the defendant, the property described in paragraph 1, or any portion thereof, cannot be located upon the exercise of due diligence; has been transferred, sold to or deposited with a third party; has been placed beyond the jurisdiction of the court; has been substantially diminished in value; or has been commingled with other property which cannot be divided without difficulty.